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No. 05-901

Supreme Court U.S.
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In The

Supreme Court of the United States

VAUGHN H. BRUENN,

Petitioner,

v.

NORTHROP GRUMMAN CORPORATION. KENNETH MARKS, AND DOES 1-10,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Second Appellate District

REPLY TO BRIEF IN OPPOSITION

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Petitioner, in Propria persona

March 9, 2006

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REPLY TO BRIEF IN OPPOSITION

Respondent's brief in opposition does nothing more than argue the merits of the case and defend the correctness of the opinion below. Even on its own terms, Respondent's argument is flawed. But more importantly, it is an argument addressed to the merits, not a reason for denying certiorari.

On the issue of certiorari, Respondent's brief only confirms the need for review by this Court. Respondent has engaged in misinterpretation of facts and law, and is fully aware of the square conflict between the holding below and recent United States Supreme Court decisions dealing with issues of federal statutory construction and interpretation of constitutional rights. As a matter of public interest, this Court must protect against the consequences of incompetent jurors; wrongful exclusion of relevant evidence; and sex/disability discrimination in the workplace. The Court should grant certiorari and resolve these issues now.

I. RESPONDENT'S BRIEF CONFIRMS THE EXISTENCE OF A CONFLICT IN THE COURTS OF APPEALS ON AN IMPORTANT ISSUE OF STATUTORY INTERPRETATION.

Petitioner's chief argument for certiorari is that the decision below conflicts with those of other courts of appeals and most importantly, with a previous United States Supreme Court ruling relating to right to fair, impartial and competent jury trials. Pet. at 3-4. Petitioner's secondary argument relates to the improper exclusion of relevant evidence prior to trial. Pet. at 3-4. Respondent does nothing to rebut this contention. Instead,

Respondent dances around the issues of this appeal. Petitioner, of course, takes a different view of the merits. But for present purposes, the important point is that Petitioner and Respondent agree that the lower courts and the United States Supreme Court are divided as to whether the right to jury trials is a fundamental right protected under the Seventh Amendment of the United States Constitution.

The California Supreme Court's order, affirming the lower court findings and decision, narrowed and nearly obliterated the Seventh Amendment and state-granted constitutional right to a fair, impartial and competent jury trial through with its creation of a legal fiction that the "presumption of prejudice" can be rebutted by the trier of fact, *sua sponte*, thus permitting the trier of fact to bypass the need to conduct a hearing on juror incompetence. This is not a matter where a litigant is denied a jury trial through waiver or arbitration. The significance being that since California has incorporated the language and intent of the Seventh Amendment into its constitution, and has formulated identical court rules, the impingement of the right to a fair, impartial and competent jury properly and justifiably transforms this issue into a federal law issue by virtue of the fact that Article I, § 16 of the California Constitution mirrors in essence, the Seventh Amendment of the United States Constitution. Even if the California Constitution was significantly different from the Seventh Amendment the state constitution cannot abridge the basic right to a jury trial, provided for in the Seventh Amendment.

A. 28 U.S.C. § 1257 and Rule 10 Empower the United States Supreme Court and Mandate the Acceptance of Petitions from Either a Federal Court of Appeals or a State Court of Last Resort.

28 U.S.C. § 1257 empowers this Court to review "final judgments or decrees" rendered by the highest court of a State in which a decision can be had where the validity of a federal or state statute has been drawn into question on federal grounds, or where any right is "specially set up or claimed" under federal law. Rule 10 narrows the circumstances in which the Court may accept a petition. Rule 10, as amended in 1995, further states that the Court will not ordinarily entertain a case where the asserted error "consists of the misapplication of a properly stated rule of law." In essence, where the applicable rule of law is settled, the Court will not supervise its application to particular facts and circumstances even if the application is arguably wrong. Nor does Rule 10 require the Court to grant certiorari to review "erroneous factual findings."

But Petitioner is not simply alleging errors of fact and law by challenging his pretextual termination from Northrop under the Fair Employment and Housing Act, Government Code § 12920, *et seq.* (hereinafter "FEHA"). Rather, Petitioner is asserting his right to have the matter resolved by this nation's highest court based on the abridgement of the rights Petitioner would have otherwise enjoyed but for irreversible court error involving the misapplication and misinterpretation of state and federal law. This petition presents an opportunity for this Court to resolve a conflict over whether the Seventh Amendment right to trial by a fair, impartial and competent jury applies where a state equivalent (a mirror image) to the Seventh Amendment,

whose language and intent are in essence identical, and whose application and interpretation has been called into question, merges with its federal law "Siamese twin."

B. The California Supreme Court's Denial of Bruenn's Petition for Review Without Reaching the Merits of His Appeal Conflicts With the Analysis in *Tanner v. United States*, 483 U.S. 107 (1987).

The issue of juror misconduct usually involves allegations of juror bias, extrinsic or intrinsic, but in the instant case the issue relates to juror incompetence on account of limited English proficiency, preventing the juror from performing his duties under California Civil Procedure ("C.C.P.") § 203(a)(6), thus rendering him "unqualified" to participate in deliberations. The right to a fair and impartial jury implies "the right to a mentally competent jury." *McIlwain v. United States*, 464 U.S. 972, 975 (1983) (citing *Jordan v. Commonwealth of Massachusetts*, 225 U.S. 167, 176 (1912)).

This Court dealt with the broader view of juror misconduct and held that "[d]ue process implies a tribunal both impartial and mentally competent to afford a hearing." *Tanner v. United States*, 483 U.S. 107, 126 (1987) (citing *Jordan*, *supra*, at 176). Unfortunately, the *Tanner* court stopped short of validating post verdict investigation into juror misconduct, fearing investigations would tarnish the process and reduce the effectiveness of the jury system, notwithstanding "irresponsible or improper juror behavior." *Tanner*, at 142. This ruling is clear in purpose and intent. Nonetheless, the *Tanner* ruling, in its shortsightedness, was vague as to its application, and thus served as the stimulus for the lower courts to disregard

and misinterpret the right to a fair, impartial and competent jury.

In the instant case, the trial court judge received a note from the jury foreperson stating that one of the jurors was having trouble speaking English. The juror in question had difficulty participating in deliberations and had requested a translator, which the court swiftly denied. The note read: "One of our jurors, while understanding the testimony, is finding it difficult to understand the liberations [*sic*]. English is his second language. We all feel this may jeopardize our deliberations. He says he needs a translator." Pet. at 26a (Appendix D). Clearly, the juror in question was going to be just as incompetent on Monday as he was on the previous Friday, and should prompt this Court to ask itself what useful purpose was gained by continuing the matter a few days? Obviously, none in this case. The juror's ongoing and permanent inability for purposes of the trial to participate in deliberations was tantamount to permanent juror incompetence and/or misconduct. Since the state law merges with federal law as regards the right to a fair, impartial and competent jury trial, the matter now becomes an issue of federal law adaptation. The hybrid nature of the California law with regards to federal law (Seventh Amendment) right to jury trial mandates further review by this Court.

A leading Ninth Circuit case further supports Petitioner's argument. The case involves juror misconduct and stands for the proposition that a presumption of prejudice arises from any juror misconduct or incompetence. *Hasson v. Ford Co.*, 32 Cal.3d 388, 416; 650 P.2d 1171; 185 Cal. Rptr. 654 (1982). The *Hasson* court logically reasoned that "civil litigants, like criminal defendants, have a constitutionally protected right to the complete consideration of their case

by an impartial panel of jurors." (U.S. Const., Seventh Amend.; Cal. Const., art. I, § 16) *Hasson*, at 416 (citing *Andrews v. County of Orange*, 130 Cal.App.3d 944, 953 [182 Cal. Rptr. 176] (1982); *People v. Honeycutt*, 20 Cal.3d 150, 156, [141 Cal. Rptr. 698, 570, P.2d 1050] (1977)). The *Hasson* court, however, reiterated that a new trial is required *only* [emphasis added] if the complaining party can establish prejudice by the juror's inattentiveness and/or incompetence, the "rebuttable presumption" standard. In the instant case, there was clear evidence of prejudice by the juror's incompetence based on his/her limited English proficiency.

But the California Supreme Court ignored and completely bypassed the "presumption of prejudice" rule and failed to give any weight to constitutional ramifications when it received the juror note and failed to investigate. The note offered proof of the offending juror's inability to perform his/her duties. Each juror must be able to actively participate in the deliberation process; to exchange ideas and offer different viewpoints – in essence, to have meaningful discourse, to listen and present their own analysis. Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled. (U.S. Const., Seventh Amend.; Cal. Const., art. I, § 16.) *Hasson*, at 416. The Seventh Amendment and Article I, Section 16 (California) right to jury trial thus become meaningless mutterings if the lower courts are permitted to ignore the essence and spirit of the law. This Court issued its ruling in *Tanner*, but the ruling was ambiguous to petitioner's case. The law has become obtuse and unpredictable, and for that reason this Court must resolve this conflict in law by granting Petitioner's writ of certiorari.

II. RESPONDENT'S MERITS ARGUMENTS MISAPPREHEND THE NATURE OF THE QUESTION PRESENTED.

Respondent's merits arguments are not only misplaced, but also misconceived in important respects. At various points in its brief, Respondent misconstrues both the argument advanced in the petition and the parameters of the questions presented through manipulation of words; omitting key elements of law and fact. Though earlier cases do state that "the Reexamination Clause [of the Seventh Amendment] prohibits appellate review . . . , they do not foreclose the practice altogether." *Gasperini v. Center for Humanities*, 518 U.S. 415, 442 (1996) (citing *Southern Railway-Carolina Div. v. Bennett*, 233 U.S. 80, 87 (1914)). The law is unclear as to the extent of Seventh Amendment protections because there is conflict among the lower courts. Also lacking is judiciary guidance from the U.S. Supreme Court.

In the instant case, though the proceedings may have been dictated by State law, the hybrid character of the proceedings was federal in nature through incorporation of federal matters dealing with: (1) The right to a fair, impartial and competent jury as mandated both by state and federal constitutions; (2) the improper exclusion of relevant material evidence; and (3) sex and disability discrimination based on violation of FEHA, a state law "Siamese twin" of ADA. To the extent that this confusion is derived from the mistaken analysis of the court below, it is an additional reason to grant review and clarify the law in this area.

Much of Respondent's brief is addressed to the wrong question(s). This is not a case about whether state law supplants federal law or whether a litigant waives his

right to a fair, impartial and competent jury by having the matter heard in state court. Rather, the issue here deals squarely with the Seventh Amendment right to jury trial at the state level where state statutory law merges with the federal law.

Respondent argues that "Petitioner's alleged constitutional basis under the Seventh Amendment for this Petition is without merit, as the Seventh Amendment does not apply to state court civil proceedings." Opp. at 3-4. Respondent cites *Elliott v. City of Wheatridge*, 49 F.3d 1458, 1459 (10th Cir. 1995) in support. Respondent further argues that "there is no constitutional right to a civil jury trial outside of an Article III forum." *Hawkins v. Aid Association for Lutherans*, 338 F.3d 801, 808 (8th Cir. 2003).

However, the *Hawkins* ruling is inapplicable to the instant case because that case revolved around an arbitration dispute. A valid arbitration provision which waives the right to resolve a dispute through litigation in a judicial form, indirectly waives the attendant right to a jury trial. The case at bar involves not arbitration, but an actual jury trial which went awry and which necessarily injects a federal question onto itself by the very nature of the right alleged to have been violated (jury trial). Thus, Respondent's argument and supporting citations are inapplicable to the instant case.

With respect to the juror note, Respondent counters that Petitioner's attorneys were aware of the note and that they waived Petitioner's right to challenge the note by remaining silent. Respondent further alleges that "[t]he attorneys never asked for further questioning of the juror nor did they seek to excuse the juror who may have been

having some difficulty with the deliberations." The key and pivotal point here is that Petitioner's attorneys were *not* aware of the juror note. The trial judge never informed the attorneys about the juror note, as evidenced by the trial judge's hand-written response to the juror note: "The Court has no ability to provide a translator. It is too early to determine that proper deliberations can't take place. Perhaps jury should recess and come back fresh on Monday." Pet. at 26a (Appendix D).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Dated: March 9, 2006